IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

KROPP FORGE COMPANY AND KROPP FORGE AVIATION COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Kropp Forge Company, a corporation, and Kropp Forge Aviation Company, a corporation, respectfully pray that this Court issue a writ of certiorari to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit, wherein that Court on January 31, 1950, entered a decree enforcing an order of the National Labor Relations Board entered on June 14, 1946.

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners are Illinois corporations engaged in the manufacture of steel forgings.[1] The cause herein arose from a complaint filed by the National Labor Relations Board on June 8, 1945, and the Board's first amended complaint filed on July 20, 1945, based on charges filed by the United Automobile Workers, then an A. F. of L. union, and International Brotherhood of Blacksmiths and Drop Forgers and Helpers, an A. F. of L. union. The complaint and amended complaint alleged that petitioners had engaged and were engaging in unfair labor practices within the meanings of Sections 8(1) and 8(2)[2] of the Act, in dominating and interfering with the formation and administration of and contributing to the support of Employees' Association of Kropp Forge Company, a labor organization admitting to membership the employees of petitioner, and by interfering with, restraining and coercing their employees in the exercise of the rights guaranteed them under Section 7 of the Act.

After proceedings pursuant to the Act, the Board, on June 14, 1946, entered its decision finding respondents had been guilty of unfair labor practices within Sections 8 (1) and 8(2) and issued its order directing petitioners to cease and desist from dominating or interfering with the administration of, or contributing support to, Employees' Association of the Kropp Forge Company, or any other labor organization, or any successor thereto, as the bar-

1. The Kropp Forge Aviation Co. is a wholly owned subsidiary of Kropp Forge Company.

2. Sections 8(1) and 8(2) are now Sections 8(a)(1) and 8(a)(2) under the 1947 Act (Title 29 U. S. C. A. Supp. §158 (a)(1) and (2)).

gaining representative of any of their employees; giving effect to the contract with the Association, dated February 26, 1945, or to any other contract with said Association; and in any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to bargain through representatives of their own choosing and to engage in concerted activity for purposes of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the National Labor Relations Act (29 U. S. C. A. Supp. § 157). The order also required petitioners to withdraw all recognition from and disestablish the Association or any successor thereto; discontinue the Labor Management Committee as a medium for dealing with their employees with respect to grievances, wages and any other conditions of employment; and to post notices of compliance.

The Board petitioned the Court of Appeals for the Seventh Circuit for enforcement of its order on April 22, 1949, and on December 30, 1949, the Court of Appeals entered its decision that the Board's order should be enforced. Petitioners filed a petition for rehearing on January 16, 1950, which was overruled on January 31, 1950, and a decree was entered by the Court of Appeals pursuant to its decision on January 31, 1950.

It is the Petitioners' position that the decision and order of the Board are based in a large measure on statements of the Companies' officers and supervisory personnel, which were at most expressions of views, arguments or opinions, and did not contain threats of reprisal or force, or promises of benefit and, therefore, the decision of the Board is in violation of Section 8(c) of the National Labor Relations Act (29 U. S. C. A. Supp. § 158(c)), and the First Amendment to the Constitution of the United States. The decision of the Court of Appeals that the order of the Board should be enforced is therefore, erroneous.

B. OPINIONS BELOW.

The decision of the Court of Appeals is reported in 178 Fed. (2d) 822. The decision and order of the National Labor Relations Board is reported in 68 N. L. R. B. 617.

C. BASIS OF JURISDICTION.

Jurisdiction of this Court is based on Section 10(e) of the National Labor Relations Act (29 U. S. C. A. Supp. § 160(e)), and Sections 346 and 347 of the Judicial Code, as revised (28 U. S. C. A. § 1254).

D. STATEMENT OF THE CASE.

The Board, in arriving at its decision, relied upon certain statements and utterances of petitioners' officers and supervisory personnel which petitioners contend were, at most, expressions of views, arguments or opinions, and did not contain any threats of reprisal, force, or promise of benefit, and that in view of the passage of Section 8(c) of the Act (29 U. S. C. A. Supp. § 158(c)), the order of the Board should not be enforced.

Petitioners further urged that in the absence of those statements and utterances, the other acts relied upon by the Board were insufficient to sustain the decision of the Board that petitioners were guilty of an unfair labor practice within the meaning of Sections 8(a)(1) and 8(a)(2) of the Act (29 U. S. C. A. Supp. § 158(a)(1) and (2)).

The Court of Appeals found that *with* the statements there was sufficient evidence to support the Board's decision and the Court did not consider the sufficiency of the other acts in the absence of those statements. There the Court stated, 178 Fed. (2d) 822, at pages 827, 829:

> "Our examination of this entire record, including the statements and expressions of respondents' officers and supervisors, convinces us that there was substantial evidence to support the findings of the Board. * * *
>
> "It is, therefore, our duty to enforce the order of the Board unless, as respondents contend, the consideration by the Board of the statements of respondents' officers and representatives was improper under Section 8(c) of the Act. * * *
>
> "We * * * hold that the statements and expressions here in question were properly considered by the Board as constituting, and as evidence of, unfair labor practice by respondents."

The statements and utterances in question and the circumstances under which they were uttered are as follows:

Prior to 1939, except for a small group of die sinkers, and truck drivers, who were represented by affiliated labor organizations of their own choice, the employees of the Company had no collective bargaining representative (B.A. 54;[1] 63, n. 16; 103, 167, 180-181, 189, 191).

In October, 1939, as a result of the activity of William Ohlson, an old employee of Kropp Forge, and an A. F. of L. adherent, union circulars were distributed outside the plant by the International Brotherhood of Blacksmiths, Drop Forgers and Helpers (hereinafter referred to as

1. References to the portions of the transcript of proceedings printed in the Appendix to the brief of the National Labor Relations Board to the Court of Appeals, are made as follows: (B.A. ....). References to the portions of said transcript printed in the Appendix to the companies' brief to the Court of Appeals, are made as follows: (R.A. ....).

"Blacksmiths") and the International Association of Machinists (hereinafter called "Machinists"), two labor unions, both of which were then affiliated with the A. F. of L. (B.A. 54; 116-118, 129). On the day these circulars were being passed out, Plant Manager Helstrom stated to Ohlson, *"Listen, Bill, I don't want no organization in here"* (B.A. 54; 108, 118, 187). Ohlson persisted in his efforts and Helstrom again told him he didn't want any organization in the plant (B.A. 56; 118). The passing out of the Union circulars in October was the only activity taken by the A. F. of L. and nothing further was done to promote the A. F. of L. at that time. About December 15, 1939, some two months after the handbills were passed out, Ohlson prepared some round-robin petitions which stated that the signers were in favor of forming a labor organization (B.A. 54; 105, 112-113, 116-117, 130, 278). The petition did not specify any particular organization but left that question open for subsequent determination by the interested employees (B.A. 54; 115, 105, 116-117, 130, 279). These petitions were circulated during working hours and about 90% of the employees signed them (B.A. 54-55; 104-105, 112, 116-117, 130, 280-281). Thereupon, Roy Kropp, President, summoned 15 or 20 of the key men of the shop to a conference in the plant offices, after working hours (B.A. 55; 107-108, 113-114). The Vice-President, Raymond Kropp; Secretary, Charles F. Johnson; and Plant Manager, Helstrom were present. The Board's witness, Edberg, testified that these officials *"suggested or referred to it that they couldn't stop us in regard to organizing, but to try to make it a shop organization * * *"* (B.A. 55; 107-108, 113-114).

Shortly thereafter Helstrom offered the employees the use of the plant machine shop for a meeting and election to determine what kind of an organization they should have (B.A. 56, 118-119, 124, 131). On December 30th, Ohl-

son posted on the bulletin boards notices prepared by one of the office employees, announcing that such a meeting would be held at the close of work on noon of that day, in the machine shop (B.A. 56, 112, 113, 118-119, 120-121, 105, 137, 323).

On the same morning, there was posted on the bulletin boards, a notice over the signature of President Kropp, announcing that in celebration of the winding up of the old year, beer and sandwiches would be served at noon that day in the same machine shop (B.A. 57, 106, 137, 120-121, 323).

On the same morning also, about two hours before the scheduled meeting, President Kropp stopped Ohlson, the A. F. of L. adherent, and the admitted instigator of the Association, and in the presence of Secretary Johnson, said, *"I don't care whether the employees form an independent organization or one affiliated with the A. F. of L., but for the love of Pete, anything but the C. I. O."* (B.A. 56, 120). On cross-examination, Ohlson testified that at that conversation Mr. Roy Kropp and Johnson also said, *"they didn't care whether you had an independent union or an A. F. of L. union, that it was entirely up to the men, and that he* (Roy Kropp) *and Johnson would cooperate with any union that was selected"* (R.A. 14, 15, 16). About one-third of the employees attended the meeting (B.A. 58, 120, 121, 129, 202, 229). Ohlson acted as Chairman (B.A. 58, 122). *Helstrom, present at the outset of the meeting, told the employees they were free to meet in the machine shop and then left* (B.A. 58, 120, 121, 122, 129, 202, 229).

At the meeting in the machine shop, after a discussion of the relative merits of organizing as an affiliate of the A. F. of L., the C. I. O., or as an independent union (B.A. 68, 121), the overwhelming majority of the employees present voted for a shop organization. The A. F. of L. received not more than 3 or 4 votes and the C. I. O. not

more than 6 votes (B.A. 58, 68, 121, 122, 123). After the meeting, beer and sandwiches were served in the machine shop. Helstrom and Foremen Carlson and Dahl returned for this party and the two foremen *congratulated Ohlson on the decision of the employees to have an independent organization* (B.A. 43; 58; 123).

While activity of rival A. F. of L. unions was in progress during 1944, two conversations between representatives of petitioners and employees occurred. The first of these conversations occurred when Plant Manager Sweeney summoned employee Areen to his office and asked him what he knew about the A. F. of L. (B.A. 75, 241-242). Areen answered that he didn't care; that he was going to leave Kropp Forge pretty soon and then Sweeney said, *"Well, Dave, stick with me. You will go places"* (B.A. 242). The second conversation occurred between employee Clinton and Superintendent Lane. Clinton went to Lane and asked him for a raise. Lane gave him no definite answer about the raise but asked him what he knew about the A. F. of L. Clinton said there was activity within the shop and Lane then said, *"We don't want the A. F. of L. in here. * * * They won't do us any good. * * * The Association could do as much for the men as any outside organization or more"* (B.A. 77, 148-149). On cross-examination, Clinton testified, "I rather thought Tom Lane was stating his preference" (R.A. 38).

The record shows that petitioners allowed their employees to discuss union matters freely in the plant and the trial examiner so found (B.A. 84).

The material findings of the Board in question, relating to these statements, are as follows (B.A. 43-44):

> "We agree with and adopt the Trial Examiner's concluding finding that the respondent violated Section 8(1) and (2) of the Act with respect to the Association. We rely particularly upon the following evidentiary findings: (1) When the employees were

forming a labor organization, Kropp Forge urged them to make it a shop organization, gave them a party designed to influence them to that end, and congratulated them when they voted to follow management's desire. * * * (3) Thereafter, the Company contributed support to the Association in various ways: * * * by stating that the Association could do more for the employees than an outside union. (4) The Companies further assisted the Association by statements of the President Roy Kropp that he did not want the C. I. O., and Superintendent Lane that the Companies did not want the A. F. of L. and by the questioning of employees by Plant Manager Sweeney and Superintendent Lane about the A. F. of L."

In reply to respondent's contention that these statements fall within the free speech guarantee of the First Amendment to the Constitution, the Board stated (B.A. 44):

> "The respondents also contend that the statements attributed to them fall within the free-speech guarantee of the Constitution because they were mere expressions of preference and contained no 'threat, coercion or intimidation.' In the light of the respondents' entire course of conduct and also because the statements went further than merely expressing an opinion as to the merits of the labor organization involved, we find that the Trial Examiner was correct in holding that the statements were not privileged as free speech."

The Board further stated (B.A. 45):

> "We find, upon the entire record, that the respondents dominated and interfered with the formation and administration of, and contributed support to, the Association. We further find that by such acts, and by the statements and questions of President Roy Kropp, Plant Managers Hellstrom and Sweeney, and Superintendent Lane, the respondents interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act."

The decision of the Board was rendered before the Taft-Hartley Act amended the National Labor Relations Act by adding Section 8(c) (29 U. S. C. A. Supp. § 158(c)). Petitioners contended before the Court of Appeals that this Section applies to the instant case. (See *Pittsburgh Steamship Company, Petitioner* v. *N. L. R. B., Respondent,* (U. S. C. A. 6th) #10372, decided February 17, 1950, 17 Labor Cases, C. C. H. No. 65612; and *N. L. R. B.* v. *E. C. Atkins & Co.,* (C. C. A. 7, 1947), 165 F. (2d) 659.)

Petitioners further contended that the statements and utterances above set forth show no threats of reprisal or force, or promises of benefit, and were, at most, only expressions of views, arguments or opinions and that the Board's order, which was based in a large measure upon these statements, should not be enforced. The Court of Appeals, without making any determination as to whether or not the statements set forth did constitute threats of reprisal, force, or promises of benefit, within the meaning of Section 8(c) (29 U. S. C. A. Supp. § 158(c)), and without a determination of that question ever having been made by the Board, proceeded to hold that the statements and expressions were properly considered as constituting evidence of unfair labor practices by respondents. The Court of Appeals was of the view that in spite of Section 8(c), the Board and the Courts could still consider statements and utterances of an employer, without determining whether such statements contained threats of reprisal or force, or promises of benefit, as "part of a general pattern or course of conduct" which discloses action evincing an unfair labor practice.

E. QUESTIONS PRESENTED.

The questions presented fall into two categories: (1) questions under Section 8(c) of the Act, and (2) questions under the First Amendment to the Constitution of the United States.

1. Questions Presented Under Section 8(c) of the National Labor Relations Act.

The following questions are presented under Section 8(c) of the Act:

(a) Should the Court of Appeals, since the passage of Section 8(c), enforce a decision of the Board in which statements of the companies' officers and supervisory personnel were held to constitute and be evidence of an unfair labor practice, where there has been no finding by either the Board or the Court of Appeals, that such statements contain threats of reprisal, force or promises of benefit?

(b) Do the statements in question constitute threats of reprisal or force, or promises of benefit, and therefore fall without the protection of Section 8(c) of the Act?

(c) May such statements constitute or be evidence of an unfair labor practice as "part of a general pattern or course of conduct" of an employer when they do not contain any threats or promises?

2. Questions Presented Under the First Amendment to the Constitution of the United States.

(a) Does the First Amendment apply to the statements and utterances of an employer to its employees?

(b) In view of the First Amendment, may Sections

8(a)(1) and 8(a)(2) of the Act, be interpreted to apply to statements and utterances by an employer and his supervisory personnel, when such statements did not threaten reprisal, force or benefits, or otherwise indicate the use of the employer's economic power to override the will of the employees?

(c) Do the statements of petitioners' officers and supervisory personnel constitute free speech within the protection of the First Amendment?

F. REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals as to the interpretation of Section 8(c) of the Act is in conflict with the decisions of other Courts of Appeals,[1] with the decisions of the National Labor Relations Board,[2] and contrary to the legislative intent of Congress in passing Section 8(c).[3] This conflict should be settled by this court so that the courts, the Board, employers, employees and labor unions may know the extent to which an employer's utterances may be used in unfair labor practice proceedings.

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1. *Pittsburgh Steamship Co.* v. *N. L. R. B.* (U. S. C. A. 6, No. 10372, decided Feb. 17, 1950), 17 Labor Cases (CCH #65612); *N. L. R. B* v. *O'Keefe & Merritt Mfg. Co.* (U. S. C. A. 9) 178 F. (2d) 445, decided Dec. 2, 1949.

2. *General Shoe Corp.*, 77 N. L. R. B. 124; *John Deere Plow Co.*, 82 N. L. R. B. 69; *Mylan Sparta Co., Inc.*, 78 N. L. R. B. 1144; *Tygart Sportswear Co. & MacLaren Sportswear Corp.*, 77 N. L. R. B. 613; *Fontaine Converting Works, Inc.*, 77 N. L. R. B. 1386; *Carpenter Steel Co.*, 76 N. L. R. B. 670; *Babcock & Wilcox Co.*, 77 N. L. R. B. 577.

3. House Report No. 245, 80th Congress, 1st Session page 33; Senate Report No. 105, 80th Congress, 1st Session, page 23; House Conference Report No. 510, 80th Congress, 1st Session, page 45.

2. The free speech provisions of Section 8(c) are of major importance in the administration of the Act, which have not heretofore been passed upon by this Court, and this case presents important questions of interpretation of that section which should be decided by this Court.

3. The decisions of the Board and the Court of Appeals are an unwarranted encroachment on the right of free speech guaranteed to an employer under the First Amendment and presents a matter of public importance which should be determined by this Court.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case on its docket as No. 9883, and that said judgment and decree of the United States Court of Appeals be reversed by this Honorable Court, or, in the alternative, that the judgment of the said United States Court of Appeals be reversed and it be directed to remand this case to the National Labor Relations Board for further proceedings.

Dated: April 24, 1950.

KROPP FORGE COMPANY and
KROPP FORGE AVIATION COMPANY,
Petitioners,

By: HUGH FULTON,
LEO T. NORVILLE and
LOUIS LINTON DENT,
Attorneys for Petitioners.

BRIEF.

I.

This Case Presents Important Questions Concerning the Interpretation of Section 8(c) of the Act Which Should Be Decided by the Court.

In the case at bar there has never been a determination that the statements of petitioners' officers and supervisors were threats of reprisal or force, or promises of benefit. The statements in question were relied upon by the Board and the Court of Appeals as constituting and being evidence of unfair labor practices by petitioners. The case was decided by the Board before the passage of the Taft-Hartley Act, which added Section 8(c) (29 U. S. C. A. § 158(c)) to the National Labor Relations Act. The petition for enforcement of the Board's order, however, was filed in the Court of Appeals after the passage of that Section. Section 8(c) provides as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

It has been held that that section of the Taft-Hartley Act applies to a petition to enforce an order of the Board, which was entered before the passage of that Act, such as that involved in this case. (See *Pittsburgh Steamship Co.* v. *N. L. R. B.* (U. S. C. A. 6th) decided February 17, 1950, 17 Labor Cases, CCH No. 65612.) This Court, in the same case, strongly indicated the applicability of the Taft-

Hartley Act to such a case (93 L. Ed. 1159, 337 U. S. 656). In *N. L. R. B.* v. *E. C. Atkins Co.* (C. C. A. 7) 165 Fed. (2d) 659, the Seventh Circuit held that the Taft-Hartley Act applied on a remand to it of a case decided by this Court before that Act was passed.

If Section 8(c) is properly applicable to the case at bar, in order to deny petitioners the benefit of that section, a determination would necessarily have to be made as to whether the statements and expressions of petitioners' officers and supervisors contained threats of reprisal or force or promises of benefit, in order for such statements to be considered as constituting and being evidence of unfair labor practices.

The Court of Appeals stated that in determining whether statements are protected by Section 8(c), such statements must not be considered as isolated words cut off from the circumstances and background in which they were spoken. The legislative history of Section 8(c) strongly indicates that the words themselves were only to be considered.[1] However, after announcing this principle the Court of Appeals should have either held that the statements in this case, as so considered, did or did not contain threats or promises or, if it was unprepared to make that determination, it should have remanded the case to the Board for such determination.

This Court, in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, held that the making of such determination was properly the function of the Board. The finding of whether statements did or did not contain threats or promises would appear to be a finding of fact which, under Section 10(e) of the Act, is vested exclusively in the Board. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584; *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206. It would seem, there-

1. House Report No. 245, 80th Congress, 1st Session, p. 33.

fore, that the Court of Appeals would have exceeded its power in making such a determination, even if it had made one, and the Board should have further considered the matter in the light of Section 8(c) before its order was enforced.

Conceding for purposes of argument, however, the Court of Appeals had power to make such determination, the statements here involved, regardless of how considered, clearly show that there were no threats nor promises, nor do the circumstances under which they were uttered show any. We believe this was apparent to the Court of Appeals, for instead of deciding whether the statements in question did or did not contain threats or promises, within the meaning of Section 8(c), proceeded to hold:

> "Therefore, in determining such statements and expressions constituted or are evidence of unfair labor practice, they must be considered in connection with the positions of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties. *If, when so considered, such statements form a part of a general pattern or course of conduct* which constitutes coercion and deprives the employees of their free choice guaranteed by Section 7, such statements must still be considered as a basis for a finding of unfair labor practice." (Emphasis ours.)

It is obvious, therefore, that the Court of Appeals is of the opinion that Section 8(c) made no change in the law and the Board and the Courts can still consider statements and utterances of an employer, as part of a pattern or general course of conduct, which evinces an unfair labor practice, even though they do not contain threats of reprisal or force, or promises of benefit. In practical application of the ruling announced by the Court of Appeals, all statements and utterances of an employer will be considered. It is difficult to imagine any statement of any

employer that might not be considered as "part of a general pattern or course of conduct". All statements of preference, views on labor organization in general and trivial remarks of supervisors would, under the Court of Appeals ruling, become admissible.

It is reliably reported in Volume 2, C. C. H. Labor Law Reporter, 4th Edition, Sec. 5001, Note 20, that the Board's General Counsel in a ruling not officially released, has instructed the Board's attorneys to request trial examiners to admit in evidence all statements alleged to constitute or to be evidence of an unfair labor practice, without ruling on whether or not the statements are coercive, leaving that interpretation for the Board. A more complete disregard of Section 8(c) cannot be imagined. If such statements do not "constitute evidence" they certainly should not be admitted in evidence. However, until the confusion as to the proper interpretation of this section is determined by this Court, such rulings and decisions as that, and in this case, will obtain.

The legislative history of Section 8(c) shows that one of the principal evils that Congress intended to correct was the practice of the Board in using speeches and publications of an employer, no matter how irrelevant or immaterial, that some later act of an employer had an illegal purpose. See *House Conference Report No. 510*, 80th Congress, 1st Session, where it is stated on page 45:

> "Both the House bill and the Senate amendment contained provisions designed to protect the right of both employers and labor organizations to free speech. The conference agreement adopts the provisions of the House bill in this respect with one change derived from the Senate amendment. It is provided that expressing any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form is not to constitute or be evidence of an unfair labor practice if such expression

contains no threat of force or reprisal or promise of benefit. *The practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law.* The purpose is to protect the right of free speech when what the employer says or writes is not of a threatening nature or does not promise a prohibited favorable discrimination." (Emphasis ours.)

See House Report No. 245, 80th Congress, 1st Session, page 33, where it is stated:

> *"Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely.* Thus, if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct, the Board may say that the official's misconduct warranted his being discharged, but 'infer', from what the employer said, perhaps long before, that the discharge was for union activity, and reinstate the official with back pay. It has similarly abused the right of free speech in abolishing and penalizing unions of which it disapproved but which workers wished as their bargaining agents. *The bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. This means that a statement may not be used against the person making it unless it, standing alone, is unfair within the express terms of sections 7 and 8 of the amended act."* (Emphasis ours.)

See Senate Report No. 105, 80th Congress, 1st Session, page 23, where it is stated:

> "* * * The Supreme Court in *Thomas* v. *Collins*, (323 U. S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies

and approved the doctrine of the *American Tube Bending* case (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holdling such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance,* 69 N. L. R. B. 247) or if the speech was made in the plant on working time (*Clark Bros.,* 70 N. L. R. B. 60). The committee believes these decisions to be too restrictive and, in this section provides that if, *under all the circumstances,*[1] there is neither an express or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement. * * *" (Emphasis ours.)

From this legislative history, therefore, as well as the plain language of the Act, it would seem apparent that the old rule of considering statements as "part of a general pattern or course of conduct," or as part of the "totality of the employer's conduct,"[2] when such statements were not of a threatening nature or did not promise a prohibited favorable discrimination, was abolished by this Section.

Other circuits have taken the view that since the passage of 8(c), in order for an employer's statements to constitute or be evidence of an unfair labor practice, they must be of the character excluded from the protection of that Section. (See *Pittsburgh Steamship Co.* v. *N. L. R. B.,* (U. S. C. A. 6th, No. 10372, decided February 17, 1950), 17 Labor cases, (C. C. H. No. 65612); *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.,* 178 Fed. (2d) 445, decided December 2, 1949.

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1. The Senate Bill, which was not adopted, would have permitted the Board to consider statements "under all the circumstances" in determining whether or not they constituted threats or promises. The Act was taken almost literally from the House Bill. The Act would seem, therefore, to prevent the Board from using as a basis for a finding of unfair labor practice, or as evidence thereof, any statements that on its face contained no threat of reprisal or force or promise of benefit. (See 173 A. L. R. 1419.)

2. *N. L. R. B.* v. *Virginia Electric and Power Co.,* 314 U. S. 469, same case 319 U. S. 533; *Valley Mould & Iron Corp.* v. *N. L. R. B.,* 116 Fed. (2d) 760; *N. L. R. B.* v. *Continental Oil Co.,* 159 Fed. (2d) 326.

The holding of the 6th Circuit in the *Pittsburgh Steamship Co.* case is directly contrary to the decision of the Court of Appeals in this case. In that case the Court stated:

> "With reference to the right of free speech the legislative history shows that the amendment embodied in § 8(c) of the Taft-Hartley Act was specifically intended *to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct.*" (Emphasis ours.)

Since the passage of this Section, the Board itself has refused to consider statements which are in themselves not coercive, by containing threats or promises, as part of a "general pattern or course of conduct", or as part of the "totality of employer's conduct." See: *General Shoe Corp.*, 77 N. L. R. B. 124; *John Deere Plow Co.*, 82 N. L. R. B. 69; *Mylan Sparta Co. Inc.*, 78 N. L. R. B. 1144; *Tygart Sportswear Co. & MacLaren Sportswear Corp.*, 77 N. L. R. B. 613; *Fontaine Converting Works, Inc.* 77 N. L. R. B. 1386; *Carpenter Steel Co.*, 76 N. L. R. B. 670; *Babcock & Wilcox Co.*, 77 N. L. R. B. 577.

The question as to whether or not the Board or the Court may still consider statements of an employer "as part of a pattern or course of conduct" or as "part of the totality of the employer's conduct" in determining whether or not the employer was guilty of an unfair labor practice, when such statements do not contain threats or promises, is a matter that should be determined by this Court.

II.

The Court of Appeals Has Denied the Protection of the First Amendment of the Constitution to the Statements and Utterances of Petitioners' Officers and Supervisors, in Which There Were No Threats or Promises to Use Petitioners' Economic Power as an Employer.

Quite apart from the proper interpretation of Section 8(c) of the Act, this case presents a question under the First Amendment of the Constitution of the United States. The language of that amendment, applicable here, is as follows:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

This Court has held that the guaranteee of this amendment applies to the expressions and utterances of the employer on labor matters to his employees. *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Thomas* v. *Collins*, 323 U. S. 516; and *Thornhill* v. *Alabama*, 310 U. S. 88.

This guarantee is not an absolute guarantee, however (see *Schenck* v. *U. S.*, 249 U. S. 47 and *Thomas* v. *Collins*, 323 U. S. 516), and Congress may prohibit certain speech which has a clear and present danger to cause certain acts, the evil of which Congress has a right to prevent.

While we believe that it was the intent of the decision in the *N. L. R. B.* v. *Virginia Electric & Power Co.* case (314 U. S. 469) to apply this "clear and present danger" rule, it is not at all clear from that decision. At least this seems to be the interpretation of that decision in *Thomas* v. *Collins*, 323 U. S. 516, and other Courts have followed the view that unless the language or speech of an employer contains threats or promises to use the economic power of an employer to override the will of the

employees, the employer was at liberty to express itself. *N. L. R. B.* v. *Brown Brockmeyer Co.* (C. C. A. 6), 143 F. (2d) 537; *Edward G. Budd Mfg. Co.* v. *N. L. R. B.* (C. C. A. 3), 142 F (2d) 922; *N. L. R. B.* v. *Montgomery Ward & Company* (C. C. A. 8), 157 F. (2d) 486; *N. L. R. B.* v. *Caroline Mills, Inc.* (C. C. A. 8), 158 F. (2d) 793; *N. L. R. B.* v. *Continental Oil Co.* (C. C. A. 10), 159 F. (2d) 326; *N. L. R. B.* v. *J. L. Brandeis & Sons* (C. C. A. 8th), 145 F. (2d) 556; and *N. L. R. B.* v. *American Tube Bending Co.* (C. C. A. 2nd), 134 F. (2d) 993.

An examination of the statements made by petitioners' officers and supervisors and the circumstances in which they were made, shows that they contained no threats or promises to use petitioners' economic power. Petitioners are dealing with five labor unions in their plant, three of which are A.F. of L. unions, one of which is affiliated with a National union not connected with either the A.F. of L. or C.I.O., and the Association, which is an independent union. They have never reprimanded an employee for union activity, except on one occasion which the Board found was justified (R.A. 58, B.A. 84), and have allowed the employees to engage in union activities and discussions of union matters freely within the plant during working hours (B.A. 84; R.A. 67, 31-32, 46-50).

Petitioners' officers and supervisors should have that same freedom of discussion of labor matters as its employees had. The rule of law, applicable, should not be so narrow as to grant freedom of speech to one side of a labor controversy and withhold it from the other, nor should "a perfectly innocent statement, including neither a threat nor a promise"[1] be made unlawful by reason of the fact it is made by an employer. The right of free speech should never rest or depend on the person exercising that right.

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1. See opinion of the Court of Appeals below.

The Court of Appeals quotes from *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, that "slight suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring the employer's strong displeasure." This phrase was also quoted by this Court in *N. L. R. B.* v. *Virginia Electric & Power Company.* Certainly the *International Association of Machinists* case did not hold that such "slight suggestions" voiced by an employer were beyond the protection of the First Amendment and that does appear to be the reasonable interpretation of the *Virginia Electric & Power Co.* case. If such is the correct rule, certainly the First Amendment has no application in the field of labor relations and particularly to the speeches and utterances of an employer to his employees. Any expression of an employer conceivably could be interpreted as a "slight suggestion". In *Edward G. Budd Mfg. Co.* v. *N. L. R. B.*, 142 F. (2d) 922, the Third Circuit held "slight suggestions" alone were not sufficient to sustain a finding of unfair labor practice. How, in view of the First Amendment, they could ever constitute or become evidence of an unfair labor practice or lose their character as free speech, even when some other act is committed by the employer, is difficult to understand.

The confusion regarding the *Virginia Electric* case and particularly now, since the passage of Section 8(c), necessitates a further consideration of this Court of the applicability of the First Amendment to statements and utterances of an employer or its officers or supervisory personnel. Members of this Court seem to have entertained different views of the *Virginia Electric & Power* case in *Thomas* v. *Collins, supra.* Mr. Justice Jackson felt that the Courts were denying to employers the same rule and spirit of free speech that it applied to employees and union organizers, and indicated that a further consideration of the applicability of the First Amendment to an

employer's statement was desirable, in his separate opinion in that case.

Conclusion.

This case presents matters of interpretation of Section 8(c) of the Act which have not heretofore been considered by this Court; the decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal as to the interpretation of this section, and is in conflict with the decisions of the National Labor Relations Board, and completely disregards the legislative intent of Congress in passing this section. The Court of Appeals has further denied the protection of the First Amendment to the Constitution to the statements and utterances of petitioners' officers and supervisors, in which there were no threats or promises to use any of its economic power as an employer. The case therefore presents such matters of importance as to justify the granting of a writ of certiorari to the Court of Appeals for the 7th Circuit, to the end that these matters may be reviewed and determined by this Court.

Respectfully submitted,

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